United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7632

In The

United States Court of Appeals

For The Second Circuit

JOSEPH A. LOUGHRAN, JR.,

Plaintiff-Appellant,

-against-

MICHAEL J. CODD, individually, as Police Commissioner of the Police Department of the City of New York, and as Executive Chairman of the Board of Trustees of the Police Pension Fund, Article II, GEORGE McCLANCY, individually, and as Administrative Officer, Medical Section, New York City Police Department, STANLEY AUGUST, individually, and as District Surgeon of the New York City Police Department.

Defendants-Appellees.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

HAROLD B. FONER
IRA LEITEL *Of Counsel*
Attorneys for Plaintiff-Appellant
188 Montague Street
Brooklyn, New York 11201
(212) 624-5775

10352 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C (201) 783-7288

TABLE OF CONTENTS

	Page
Point I. The challenged regulation is not designed as an aid to the promotion of safety of persons and property.	1
Point II. Any additional administrative burden placed on the Police Department by providing administrative review of the terms or conditions of confinement is both justified and constitutionally essential.	2
Point III. Plaintiff's claims for declaratory relief and damages are not moot and are properly sought.	6
Conclusion	9

TABLE OF CITATIONS

Case Cited:

Gissi v. Codd, 391 F. Supp. 1333, 1335-36 (E.D.N.Y. 1974)	3, 6

1. Point I: THE CHALLENGED REGULATION IS NOT DESIGNED AS AN AID TO THE PROMOTION OF SAFETY OF PERSONS AND PROPERTY.

For the very first time in this appeal, appellees argue that the challenged regulation and administration thereof is designed to promote "the safety of the City's populace". (Appellees' Brief at 25). Interestingly enough, such argument does not appear in the Appendix, since it was never raised or argued before the District Court.

This belated argument is grounded in the assumption that the confinement of men on sick report to their homes is the most effective method of insuring that there will be an adequate number of police officers present for each tour of duty. There is, however, no testimony or other evidence in the record to support this allegation.

In fact, the appellant herein, during the period in question, was never deemed physically fit to perform police duty. At best, it was argued that he was capable, at one time, of performing merely a restricted duty assignment, such as that of a clerk. No police officer capable of performing a tour of duty is ever relieved from such assignment to replace an injured officer on restricted duty or

sick report. Had the District Court taken testimony on this issue, such would have been established. No testimony, however, was ever taken on this in light of the fact that it was never previously argued or suggested that the confinement of officers on sick report to their homes was in any way related to public safety in addition to fiscal prudence.

2. Point II: ANY ADDITIONAL ADMINISTRATIVE BURDEN PLACED ON THE POLICE DEPARTMENT BY PROVIDING ADMINISTRATIVE REVIEW OF THE TERMS OR CONDITIONS OF CONFINEMENT IS BOTH JUSTIFIED AND CONSTITUTIONALLY ESSENTIAL.

The appellees do not deny that there exists no procedure or mechanism to review either the necessity for, the terms and conditions, or even the validity of, an order of confinement. To justify the lack of any procedural safeguards to protect the police officer against an arbitrary or capricious or illegal order of confinement, it is argued that "if each officer on sick report had the right to seek administrative review of the number of hours during which he has been given permission to leave his residence, an additional administrative burden would be placed on an already strained Police Department." (Appellees' Brief at 27).

Thus, while characterizing the confinement of a man to his home for 22 hours a day, seven days a week, as having only a de minimis effect on constitutional rights, the appellees, at the same time, would deny an officer any opportunity to review the decisions of his District Surgeon or the usurpation of his District Surgeon's authority by the Commander of the Medical Section, on the sole ground that such safeguards would impose "an additional administrative burden" on the Police Department.

Such an argument falls precipitously! Every standard or requirement designed to hoard constitutional values and to protect against abuse of power places a burden on someone. But such "burden" is indeed a small price to pay to protect against the whim and caprice that Judge Judd found to exist, after taking testimony, in the administration of the challenged regulation. Gissi v. Codd, 391 F. Supp. 1333, 1335-36 (E.D.N.Y. 1974).

The often repeated allegations in Appellees' Brief that the Plaintiff was engaging in activities inconsistent with his claimed disability, and that he was examined on a weekly basis by Dr. August, are the best evidence of the need for some type of administrative mechanism to review the terms of confinement. (Appellees'

Brief at 26, 28-30).

Plaintiff's hours of liberty were cut by 60%, from five to two hours daily, by unilateral decree of the appellee McClancy. There was no attempt to verify the accuracy of the information relied upon. Without the existence of any procedures to challenge this action, there was no way for plaintiff to deny that he ever engaged in any physical activities inconsistent with his claim of disability. Nor was there any way for the plaintiff to challenge the fact, assumed incorrectly by both the District Court and the appellees, and without any testimony or other evidence in support thereof, that Dr. August had regularly examined plaintiff, and had fixed the terms of his confinement consistent with his rehabilitative needs.

By placing the "burden" upon appellees of providing some type of administrative review of the terms and conditions of an injured officers' confinement, the permissible goal sought by appellees (fiscal prudence and the avoidance of malingering), could be fostered while at the same time the rights sought to be protected by the injured officer (not to be confined arbitrarily and denied fundamental constitutional rights), would be assured. Such burden,

under the circumstances, is indeed a light one for the appellees to hear.

The basis for McClancy's decision to cut plaintiff's hours of liberty was the "suspicion" that he was engaging in activities inconsistent with his claim of disability. There was no way for plaintiff to challenge or review such suspicions; or the fact that McClancy made such determination without prior medical consultation; or that he was not empowered, in any event, to make such a decision.

The proper basis for Dr. August's decision fixing the hours of confinement, based on medical examination, "is whether the granting of this permission (to leave the home) will expedite or impede the recovery of the sick member". (Appendix at 23). Similarly, there was no way for plaintiff to challenge or seek review of such a decision. There is not even a way for plaintiff to argue that there was no medical examination upon which to reach such decision.

Appellees only argument to support the continuation of a system which makes no provision whatever for the establishment of a mechanism to review the application of a regulation that results in

the almost total and prolonged confinement of a police officer to his home, is that such would be a burden on the Police Department.

Plaintiff respectfully prays that this justification of "burden" be rejected by this Court, and that a situation having an obvious and severe impact on the exercise of constitutional rights be corrected.

3. Point III: PLAINTIFF'S CLAIMS FOR DECLARATORY RELIEF AND DAMAGES ARE NOT MOOT AND ARE PROPERLY SOUGHT.

As in the case of Gissi v. Codd, supra, the Police Department claimed that plaintiff herein, Police Officer Loughran, was suspected of being a malingerer. Similarly, too, in both cases, after prolonged delay in the processing of the Officers' applications for disability retirement, during which time both Officers were kept almost totally confined to their homes, Civil Rights actions were instituted seeking injunctive and declaratory relief. Again, in both cases, shortly after the initiation of such litigation, the defendant quickly acted upon the applications by granting both men disability retirement.

The pattern is clear; in an effort to deny Police Officers judicial review of the challenged regulations and the administration

thereof, the Police Department, in bad faith, has attempted to make the issues presented moot.

In September, 1975, the Police Department Medical Board first denied plaintiff's application for disability retirement.

After months of confinement and consistent pain, in January, 1976, plaintiff was admitted to the Brooklyn Hospital for the painful and risky procedure of lumbosacral myelogram. This revealed a small midline defect at L4-5. (Appendix at 88). It was only two months after this positive myelogram that appellee McClancy ordered plaintiff's hours of liberty cut from five to two hours daily. One week later, on March 19, 1976, without medical consultation, McClancy unilateraly rejected a request contained in a letter from the plaintiff's physician that the terms of his confinement be made less onerous in order to allow plaintiff an opportunity for walks as a form of therapy. (Appendix at 91, paragraph 29)

The following month, on April 5, 1976, although in possession of the films of the myelogram performed on plaintiff and after confirming "evidence of a mild filling defect in the midline at the level

of L4-5 indicating probability of central disc herniation" the Medical Board, nevertheless, again deferred any decision on plaintiff's disability retirement.

It was not until June 2, 1976, after yet further objective evidence of plaintiff's disability, in the form of electro diagnostic studies performed on plaintiff at the Brooklyn Hospital in May, 1976, that the Medical Board finally determined that plaintiff was unable to perform police duty due to a herniated disc. (Appendix at 92, paragraph 33-35).

During this ten month period of time, from September, 1975 when the Medical Board rejected plaintiff's application for disability retirement until June, 1976, when it found plaintiff disabled due to a herniated disc, plaintiff languished in his home under the most onerous condition of confinement. In total, plaintiff spent more than 400 days confined to his home while on sick report, due to a confirmed herniated disc, under the challenged regulation.

Under these circumstances, plaintiff's claim for declaratory relief is viable. Additionally, at trial, plaintiff will be able to prove a deliberate and malicious intent on the part of the

defendants to deprive him of his constitutional rights.

4. Conclusion

The judgment appealed from granting defendants' motion for summary judgment and denying plaintiff's cross-motion therefor should be reversed. Alternately, the judgment appealed from should be reversed, and the proceedings remanded to the District Court for a hearing on the issues of the application of the regulation in question, and the existence of procedural safeguards to prevent abuse thereof, or the existence of alternate means to achieve the same legitimate end.

Respectfully submitted,

HAROLD B. FONER
IRA LEITEL, of Counsel
Attorneys for Plaintiff-
Appellant

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
SECOND CIRCUIT

JOSEPH A. LOUGHREN JRE.,

Plaintiff-Appellant.

- *against* -

MICHAEL J. CODD, Individually as police Commissioner of the Police Dept. of the City of NY.., Etc.

Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1715 Lacombe Avenue; Bronx, New York

That on the 14th *day of* April, *19* 77 *at* Municipal Building New York, New York

deponent served the annexed Reply Brief *upon* W. Bernard Richland

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein.*

Sworn to before me, this 14th *day of* April, *19* 77

Victor Ortega

Victor Ortega

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418850
Qualified in New York County
Commission Expires March 30